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January 17, 2003

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Portals
Washington, DC 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98; *and Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147

Dear Ms. Dortch:

The attached document addresses the impairment standard as set forth in the Telecommunications Act of 1996 and the appropriate impairment inquiry that should apply under Section 251(d)(2). Please place it on the record in the above proceeding. Please let me know if you have any questions.

Sincerely,

Dee May

Attachment

cc: Commissioner Kathleen Abernathy
Commissioner Michael Copps
Commissioner Kevin Martin
Commissioner Jonathan Adelstein
W. Maher
J. Carlisle
C. Libertelli
M. Brill
J. Goldstein
D. Gonzalez
L. Zaina
M. Carey
R. Tanner
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January 17, 2003

Honorable Michael Powell
Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Dear Chairman Powell:

I am writing to thank you for our last meeting and to follow up on a few key issues related to broadband.

The ultimate task before the Commission in its various ongoing broadband proceedings, is to define an overall regulatory regime for broadband that will produce rational market-based incentives for investment by all facilities-based broadband providers. While the immediate issue in the *Triennial Review* is the unbundling rules for broadband, it is therefore important to address that issue with a view toward the ultimate resolution of all the inter-related broadband issues that are now pending.

1. The broadband market is a separate and distinct market.

The starting point of any broadband analysis is the fact that broadband is a separate and distinct market from the traditional services offered by either cable operators or phone companies. Even where these companies deliver their traditional services over the same wires as broadband, there should be no question that the broadband market is separate from both video distribution *and* traditional voice telephone service.

The Commission confirmed this analysis in its *Cable Modem Declaratory Ruling*, 17 FCC Rcd 4798, ¶ 7 (2002), where it concluded that cable broadband is not a cable service. From this conclusion, it followed necessarily that cable broadband is not subject to the old rules

governing video distribution, including requirements to obtain local franchises, pay franchise fees to municipal authorities, and make broadband capacity available to interlopers seeking leased access.

The situation for phone companies is the same. Even though our broadband services in many instances are delivered over the same wires as voice telephony, the broadband services (and the network capabilities used to provide them) should not be subject to the old rules governing narrowband services.

The reason, as the Commission found in the order approving the AOL Time Warner merger and elsewhere, is that broadband is a distinct market from narrowband. *See* 16 FCC Rcd 6547, ¶ 72 (2001). This market is already competitive, with multiple providers vying for the attention of consumers, and new technologies, such as satellite, fixed wireless and others, poised to expand their presence in the market. Investment is the key to this new market, as massive expenditures are required to transform old networks into new ones optimized to deliver broadband services, and to build entirely new networks delivering broadband over new technologies.

As we have explained previously, there are several key hallmarks of an overall regulatory regime for the broadband market that will provide rational incentives to make these investments, and thereby promote the continued development of multiple facilities-based platforms. *First*, as it already has in the case of cable modem services, the Commission should permit all broadband transmission services to be provided under Title I. It should do so both when these transmission services are part of a bundled service offering (in which case they have long been classified as information services) and when they are offered on a stand-alone basis (in which case they should be classified as private carriage). *Second*, as it has for cable modem services, the Commission should make clear that its *Computer Rules*, which were designed for narrowband services at a time when local telephone companies were thought to have a bottleneck in that market, do not apply to broadband. *Third*, as is true for cable companies, the Commission should make clear that local telephone companies may provide access to ISPs and other content providers at commercially reasonable, negotiated rates (not regulated, cost-based rates). *Fourth*, and again as is already true for cable, local telephone companies should not be required to provide unbundled elements for use to provide broadband services.

With respect to the specific unbundling issues in the *Triennial Review*, there is no question, as addressed further below, that all segments of the broadband market are both contestable and are being actively contested by multiple competing providers using their own facilities platforms. Under these circumstances, the Commission simply cannot, consistent with the terms of the Act and binding precedent from the Supreme Court and D.C. Circuit, find that there is any impairment with respect to broadband. To the extent the Commission finds that competing providers continue to be impaired with respect to voice services, that is an issue that it can (indeed, must) deal with separately. But it cannot let its conclusions with respect to the voice market infect its conclusions with respect to the broadband market.

2. The Commission must conduct a service-specific impairment analysis that addresses broadband separately from traditional voice services.

The legal analysis that compels this result is straightforward. First, the Act itself prescribes a *service*-specific impairment analysis. This follows directly from the terms of the impairment standard itself, which requires the Commission to determine whether competing providers are impaired with respect to their ability "to provide the *services* that [they] seek to provide." *See* § 251(d)(2) (emphasis added). Indeed, the Commission itself has conducted precisely this type of service-specific impairment analysis in its prior orders. For example, in its *Supplemental Order Clarification*, 15 FCC Rcd 9587, ¶ 14 (2000), the Commission concluded that special access service constitutes a distinct product or service market, and therefore is subject to a separate impairment analysis under the terms of the Act. The D.C. Circuit expressly upheld that analysis in its *CompTel* decision, 309 F.3d 8, 12 (2002), and suggested that, while the issue was not squarely presented there, a service-specific analysis not only is permitted by the Act, but likely is compelled by the Act's express terms.

Of course, the Commission itself has recognized that a service-specific impairment analysis is appropriate for broadband, both in its *UNE Remand* and *Line Sharing* decisions where it analyzed broadband (which it referred to as advanced services) separately. Indeed, the need to perform a separate impairment analysis for broadband necessarily follows from the Commission's repeated, and unquestionably correct, conclusion that broadband constitutes a separate and distinct market from traditional narrowband services. This means that in the current unbundling proceeding, the Commission must undertake separate impairment analyses for broadband services and for traditional voice services.

Second, competing providers may obtain unbundled access only to those network capabilities they need to provide the services for which they are impaired. Again, this follows directly from the terms of the Act and the Commission's previous orders. Under the express terms of the Act, incumbents are required only to provide competitors with "*access* to network elements on an unbundled basis" in order to provide the services for which they are impaired. *See* ∋ 251(c)(3) (emphasis added). And, as the Commission has expressly found, what competitors get access to, consistent with the definitions in the Act, is the particular "features, functions, and capabilities" of the network facility at issue that allow them to provide the service for which they are impaired. *See* ∋ 153(29). Indeed, this is the very analysis adopted by the Commission in its *Line Sharing* decision, 14 FCC Rcd 20912, ¶ 19 (1999), where it defined the element that competitors could obtain access to as the capability to provide high speed data services over a copper loop. The D.C. Circuit expressly upheld this *definitional* analysis in its *USTA* decision, 290 F.3d 415, 430 (2002). It also is consistent with the analysis the Commission has employed in any number of other decisions, from defining capacity on shared transport as an element to defining operator services as an element, that consistently have been upheld by the courts of appeals and even the Supreme Court.

To put this latter point in practical terms, take the example of an incumbent that deploys an integrated fiber-based network architecture. If the Commission were to conclude that there are circumstances under which competitors are impaired with respect to some particular service

(such as voice), the incumbent would not have to unbundle the entire fiber loop and turn it over to the use of a competitor. Rather, the incumbent would merely have to provide competitors with access to the *capability* to provide the specific services for which the Commission concludes they are impaired.

For analytical purposes, in other words, the Commission can conceive (and has) of the phone company wires as having two separate channels. The narrowband channel is used to provide traditional narrowband services, while the broadband channel is used to provide broadband services. Of course, from a purely technical standpoint, the two in some instances may be provided over separate wires, while in others they will be provided over a common integrated network. But the key conceptual point is that the broadband and narrowband channels must be addressed separately, and it is the narrowband channel alone that may be subject to any unbundling or other rules governing traditional voice services.

3. The Commission should find that there is no impairment for broadband.

As noted above, while the record here confirms that broadband is a developing market in which significant additional investments need to be made, it also clearly establishes that all segments of the broadband market are both contestable and are being actively contested by multiple providers vying to provide service over their own facilities platforms.

In the larger business segment, which includes services such as Frame Relay and ATM, the major long distance carriers dominate. Indeed, AT&T, WorldCom and Sprint control more than two-thirds of the retail market for Frame Relay and ATM services.

In the residential segment, cable continues to dominate with approximately two-thirds of all residential broadband subscribers. In addition, two-way satellite services (that do not rely on a telephone uplink) are now available, and a variety of fixed wireless and other emerging technologies are entering in many areas as well.

Some parties have argued that small business should be treated as a separate market segment. In contrast, the Commission previously has included small businesses along with residential customers as part of the mass-market segment. This makes good sense, because the same providers that serve the residential market also are vying to serve the small business market.

Regardless of whether the Commission analyzes small businesses separately or as part of the mass market, however, it is clear that the small business segment is both contestable and being contested. Indeed, while the small business segment unquestionably is still developing, it is developing competitively. Although broadband providers initially focused on serving either residential customers or larger business customers, a number of competing platform providers have now tailored services specifically to meet the needs of smaller business customers and are moving to serve these customers.

Cable companies are moving especially aggressively to serve small businesses. As we have documented separately, six of the seven largest cable operators already have developed and offer a separately branded service for business customers. Several also have formed separate business units dedicated to providing broadband to business customers (such as Cox, Comcast and Charter). Cable operators have designed their services to provide the features that small businesses desire, such as high upstream bandwidth and the ability to use a single connection for multiple computers. According to analysts, cable operators were already providing cable modem service to between 600,000 and 700,000 business subscribers as of year-end 2002 – more than 40 percent of all small business broadband – and this figure is projected to as much as triple over the next three years. And cable operators (such as Time Warner and Comcast) also are rolling out fiber-based data services capable of speeds of from 1 to 100 megabits by taking advantage of their existing fiber infrastructure and passive optical network technologies.

Other broadband providers also are moving to serve small business customers. Two satellite providers – Hughes and StarBand – have begun providing two-way services (that do not rely on a telephone uplink) designed specifically for small businesses. Fixed wireless and other emerging services (including use of technologies such as WiFi for local distribution) also are alternatives in many areas. And many small business customers also are sufficiently clustered that entrants can readily overbuild broadband networks to serve them, and some competitors are doing precisely that.

Small business customers in major central business districts have still other alternatives. Indeed, these central business districts are the areas that competitors moved into first, even before the passage of the 1996 Act. And competitors that provide broadband services such as Frame Relay and ATM to larger business customers located in buildings in central business districts obviously could provide lower-speed versions of those services to small businesses in the buildings as well. Indeed, analysts estimate that approximately one-third of all Frame Relay services already are sold at fractional speeds.

As even this brief summary makes clear, all segments of the broadband market are developing competitively. Under these circumstances, imposing an unbundling obligation on one, and only one, service provider would be affirmatively counter-productive and, by handicapping one potential competitor, would jeopardize the continued development of this market segment on a competitive basis.

Accordingly, the Commission should eliminate any requirement to provide unbundled access to elements of the incumbents' networks for use to provide broadband services. This means that the previous line sharing requirement must be eliminated. Indeed, there simply is no way to impose a line sharing obligation consistent with the impairment standard in the Act or the D.C. Circuit's *USTA* decision. As a purely transitional measure, however, existing customers could be grandfathered for some period of time.

Likewise, the requirement to provide collocation at the remote terminal also should be eliminated. This obligation was imposed principally on the mistaken belief that, by providing a means of leasing the copper subloop portion of hybrid loop facilities, it would serve as a way of

providing broadband services in those circumstances. In practice, however, it has proven to serve no purpose, except to impose added cost, operational complexity and uncertainty on the incumbents. And, of course, if other carriers did come to roost in the middle of an incumbent's loop, they would then claim that they were dependent on that configuration and that the incumbent should be forced to maintain it, triggering yet further investment-deterring litigation. Consequently, the requirement to provide collocation at the remote terminal should be eliminated along with the other broadband unbundling obligations.

With respect to the local loop, the Commission should make clear that where incumbents have deployed fiber in the loop, they do not have to provide unbundled access to that loop for use to provide broadband services. To the extent competing carriers want to use the local telephone company's network to provide broadband services, they may enter into voluntary negotiations to establish private carriage arrangements at commercially reasonable rates. Or, alternatively, they could negotiate voluntary partnering arrangements with satellite or cable providers, or invest in one of the many other developing technologies.

Finally, in those areas where fiber has not yet been deployed in the loop, to the extent competing carriers provide broadband services by leasing an entire copper loop, the same conclusion logically applies. Nevertheless, the Commission could, as a purely transitional mechanism, establish a transition period of up to two years during which carriers could purchase the entire copper loop under existing rules in those areas where fiber has not been deployed, and continue to use it to provide broadband services. At the end of the transition period, however, carriers could only provide broadband services over all copper loops under negotiated private carriage arrangements at commercially reasonable rates.

4. <u>If the Commission finds that there is impairment with respect to voice, it should limit any unbundling obligations to providing a voice grade capability</u>.

With respect to the separate analysis for voice services, one issue that the Commission obviously will have to address is whether competing providers are impaired in their ability to provide voice services where incumbents deploy new all fiber network architectures.

As we (and others) have explained previously, we believe the correct answer is that carriers are not impaired in any meaningful sense even for voice under this scenario. On the contrary, the incumbent in this situation is building what amounts to an all new distribution network, and other providers have the same ability as the incumbent to do so. Indeed, competitors actually have an advantage to the extent they have a greater ability to target deployment of their fiber networks to the most lucrative customers.

To the extent the Commission disagrees, however, any unbundling requirement it imposes should be limited to providing unbundled access to a voice grade capability to reach the customer. In the context of a fiber loop facility, this means that, in any circumstances where the Commission retains an unbundling obligation for voice, the requirement should be limited to providing a voice grade capability.

Today, where incumbents have deployed hybrid copper/fiber loops, they provide access for voice services either by providing access directly to the digital loop carrier (which is possible where universal digital loop carrier is present), or by providing access to a spare copper loop (which is the only alternative where integrated digital loop carrier is present because it cannot be unbundled technically). Going forward, as incumbents deploy all fiber loop facilities, they likewise should have the choice of satisfying any obligation by providing access in some way to a voice grade capability over the new fiber network (essentially, the equivalent of a 64 kilobit signal in today's technical parlance), or by providing access to a copper loop.

Under no circumstances, however, should incumbents be left with an obligation to maintain two parallel networks. Any such requirement would merely inflate the cost and operational complexity of deploying new network architectures, and deter development of the network and the deployment of new broadband services. Indeed, in some places, existing facilities may have to be removed to make room for the new ones, in which case it may not even be possible (let alone economic) to maintain duplicate networks.

This means that as incumbents deploy new network architectures, they need the option of moving any carriers that previously obtained unbundled copper loops onto the new fiber network (provided they have access to a voice grade capability over the fiber network). Otherwise, they will still be left with the burdens of maintaining two parallel networks. Accordingly, under all circumstances, incumbents should be able to move all such customers over to the new network within no more than a year after the new network is deployed in a given area, and sooner where circumstances warrant. This would allow carriers to continue to obtain access to a voice grade capability at unbundled element rates for so long as the Commission maintains an unbundling requirement. And, as noted above, if these carriers also want to provide broadband services over the new fiber network, they could do so under private carriage arrangements, at commercially reasonable rates.

Finally, in all events, even if the Commission determines that there are some circumstances where incumbents must provide access to a voice grade capability once they have deployed fiber, there are two specific circumstances in which incumbents should not have to provide unbundled access to a voice grade capability. The first is in so-called "greenfield" situations. These include new developments, office parks, or major buildings that have not previously received service and where any provider, whether the incumbent or a competitor, will be deploying facilities for the first time. The second is in wire centers where cable telephony is already available. Where there already is a second fully facilities-based wireline provider competing head-to-head, there is no justification for imposing an unbundling obligation on only one of those competitors. Nor can imposing such an obligation be squared with the impairment standard in the Act, since the market at that point is clearly contestable and is unquestionably being contested.

5. <u>The Commission can address issues relating to the unbundling of DS-1 capable loops separately from broadband</u>.

As we have explained elsewhere, the Commission should eliminate the obligation to provide unbundled access to DS-1 capable loops in those areas where the Commission itself previously concluded that the market not only is contestable, but is already being contested through the use of competing carriers' own facilities. Specifically, it should do so in those areas where it has concluded there is sufficient competition to provide pricing flexibility for special access loops (referred to as "channel terminations"). To date, Verizon has obtained such relief for approximately 25 percent of its wire centers.

However, this is an issue that the Commission can address separately from broadband. This follows from the definitions that the Commission itself has used for broadband services and that Verizon previously proposed for use as a common definition in all the ongoing broadband proceedings. For example, in the context of various merger review proceedings, the Commission has defined "advanced services" (its moniker for broadband) primarily in terms of the particular technology employed. That definition encompasses services such as ADSL, IDSL, xDSL, Frame Relay and ATM that rely on packetized technology and have the capability of supporting transmission speeds of at least 56 kilobits in each direction, but expressly excludes voice services and other traditional data services. In other contexts, the Commission has defined "advanced services" primarily based on speed to include services with a transmission speed of at least 200 kilobits in both directions. The definition that Verizon proposed simply harmonizes the two by providing that broadband includes services that *either* rely on packetized technology *or* that have transmission speeds in excess of 200 kilobits in both direction, but *excludes* voice services and traditional (*i.e.*, non-packetized) data services.

Significantly, this definition would exclude DS-1 capable loops from the definition of broadband. Indeed, when Verizon provides unbundled access to a DS-1 loop, the signal delivered to a requesting carrier is not packetized but is capable of providing voice services and traditional data services. As a result, to the extent that competing carriers are using DS-1 capable loops to extend the reach of their own local telephone networks, they could continue to do so in any areas where the Commission maintains an unbundling obligation with respect to DS-1 loops.

By the same token, this definition would mean that competing providers are not entitled to unbundled network element rates if they use those loops to provide broadband services such as Frame Relay or ATM. But, so far as Verizon can determine, carriers do not use unbundled loops for this purpose anyway. And the simple fact is that the two major long distance carriers already dominate the Frame Relay and ATM business *without* using unbundled elements, controlling more than two-thirds of the retail business for these services.

In addition, to the extent the Commission maintains a requirement to provide unbundled access to DS-1 capable loops, it should tailor that requirement to the way the competing carriers claim they intend to use it. Specifically, competing carriers claim that they need access to DS-1 capable loops as a transitional bridge to supplement their own local telephone network facilities while they continue to build out.

Accordingly, the Commission should limit the period during which competitors get access to DS-1 capable loops at unbundled element rates to two years from the date they obtain

access to a given loop. After that date, the price should revert to special access rates. That is a sufficient period of time to allow the carrier to build its own facility to replace that loop, while preserving its incentive to do so. And if the carrier chooses not to build its own facility, it can still use the existing loop to reach its customer; all that changes is the rate.

Finally, of course, as we have explained at greater length separately, the Commission must retain its existing restrictions on the use of unbundled network elements to provide traditional special access services, *i.e.*, in those situations where the requesting carrier seeks to use the requested network element to establish a connection between the customer's premises and a carrier's point of presence without providing "a significant amount of local exchange service."

6. The Commission should initiate a further proceeding to determine the impact of the development of IP telephony on any remaining obligations it imposes here to provide access to a voice grade capability on next generation networks.

In the future, phone company networks will increasingly be designed to optimize their broadband functionality. And as voice-over-IP becomes a commercial reality, the voice market will be opened to a range of additional competitors. These developments will raise a host of new and important questions for the Commission to resolve, including the role that IP-telephony competitors play in the Commission's impairment analysis.

Accordingly, the Commission should open a further proceeding to consider how the changes in network architecture spawned by broadband, and the development of voice-over-IP, will affect the unbundling of voice service capabilities.

In framing this further proceeding, as well as deciding the current one, the Commission should work to ensure that as markets for voice, video, and broadband data all converge, rules designed to spur entry into the traditional voice market do not retard the development of broadband networks. After all, the purpose of the Act was not to arrest the evolution of phone company networks, or to require phone companies to build networks in perpetuity that serve as convenient wholesale platforms for non-facilities based providers of narrowband services. Just like all firms, these would-be competitors must respond to changes in the marketplace, and should not be allowed to use the regulatory process to bind phone companies to the technologies or the networks of the past.

Sincerely,

William P. Barr